Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. A-833

77-1490

LEARIE LEO ALFORD,

PETITIONER,

-VS-

STATE OF FLORIDA,

RESPONDENT.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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STATE OF FLORIDA,

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OPINION BELOW

The opinion of the Florida Supreme Court sought to be reviewed is reported as *Alford v. State*, 355 So.2d 108 (Fla. 1977).

JURISDICTION

Respondent acknowledges that if the question presented constitutes a substan-

tial federal question, jurisdiction is properly invoked pursuant to 28 *U.S.C.* §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the due process clauses of the 5th and 14th Amendments to the United States Constitution.

STATEMENT OF THE CASE AND FACTS

On October 16, 1973, the Honorable Marvin Mounts, Circuit Judge, pursuant to a recommendation by the jury that Petitioner be sentenced to death and after having made the appropriate findings of facts, sentenced Petitioner to death (Res. App. I).

An appeal was taken to the Supreme Court of Florida and that court affirmed the judgment and sentence. *Alford v. State*, 307 So.2d 433 (Fla. 1975). Petitioner filed a petition for a writ of certiorari in this

Court seeking review of said decision, and after due consideration this Court denied said petition. *Alford v. Florida*, 428 U.S. 912 (1976).

Following this Court's rendition of *Gardner v. Florida*, 430 U.S. 349 (1977), the Florida Supreme Court in this case, and in every other case decided by the Florida Supreme Court prior to *Gardner*, supra, entered an order directing the trial judge to file a response within twenty days ". . . stating whether he imposed the death sentence in the identified cause on the basis of *consideration* of any information not known to appellant. . ." (Pet. App. 13). The court further authorized appellant to file an application for relief within thirty days from receipt of the trial judge's response (Pet. App. 14).

Pursuant to said order Judge Mounts filed his response wherein he stated that he ". . . did *not consider* information unknown to the appellant in conjunction with any matter in this case. . ." (Pet. App. 12). Attached to Judge Mounts' response, *which is not included in Petitioner's appendix*, was a letter dated September 12, 1973 to Joel Padgett, the probation officer who prepared the presentence investigation report, which supported the statements contained in the response filed pursuant to *Gardner*, supra, (Res. App. II). In said letter Judge Mounts stated:

> ". . .in a case in which the jury has recommended the supreme penalty known to our law, that there well may be a constitutional right to disclosure of this confidential section to the defendant. As far as I know, there is not yet a judicial decision on what the meaning of 'factual material' in Rule 3.713(b) may be. I feel that if I cannot release the confidential section to the defendant, I should

> not review it myself in this particular case. I know that this means that I shall not have the benefit of a major portion of your work in this report because of this view and I regret that this is so.
>
> "Accordingly, do not deliver that section of your report to me." (Res. App. II)

On June 9, 1977, Petitioner filed a Motion to Vacate Death Sentence alleging he received a copy of the confidential evaluation portion of the presentence report from the Governor of the State of Florida, which is a part of Florida's clemency procedures, and that said report ". . . affirmatively contradicted. . ." Judge Mounts' response in that the report indicated that the judge was ". . . made *aware* of certain facts during his discussion with the Parole and Probation Officer." (Pet. App. 10).

Respondent filed its response to the motion to vacate (Res. App. III) wherein

it denied the allegation that the report contradicted Judge Mounts' response and urged that assuming Judge Mounts was "aware" of "certain facts", it didn't mean he "considered" those facts in imposing the sentence of death. Respondent urged *Gardner*, supra, was not applicable and that Petitioner was not entitled to a new sentencing hearing.

Oral argument was held and in due course the Florida Supreme Court rendered the decision sought to be reviewed denying Petitioner's motion to vacate.

QUESTION PRESENTED

WAS PETITIONER DENIED DUE PROCESS OF LAW BY THE TRIAL JUDGE IN IMPOSING SENTENCE BECAUSE HE MAY HAVE BEEN AWARE OF FACTS NOT DISCLOSED TO APPELLANT WHICH HE DID NOT CONSIDER IN IMPOSING SENTENCE?

WHY THE WRIT SHOULD NOT BE GRANTED

Petitioner's argument apparently is that

his sentence was imposed in violation of *Gardner v. Florida*, supra, because the trial judge was aware of "certain facts" disclosed to him by a probation officer who prepared a presentence investigation report. Petitioner refers to the deposition of Joel Padgett that has not been made a part of the record nor served upon counsel for Respondent, and was apparently taken after the filing of the motion to vacate.

Respondent respectfully submits that the petition fails to present a substantial federal question and that this Court should decline to grant discretionary review. Moreover, Respondent urges that *Gardner v. Florida*, is not applicable to the instant case.

Prior to this Court's decision in *Gardner*, supra, Judge Mounts appreciated the constitutional question presented by the denial

of information from an individual facing the death penalty and directed the probation officer not to deliver the confidential section of his presentence report to him. Judge Mounts clearly felt that if the information could not be released to the defendant, then he should not review it himself. Of course, this Court's subsequent decision in *Gardner* vindicated Judge Mounts' judgment in this respect. His response shows that he did not consider any information not known to Petitioner in imposing his sentence and that response is uncontradicted. Indeed, reference to the written sentence imposed by Judge Mounts fails to indicate he relied on any evidence other than that presented to the jury in open court.

In contrast to the case sub judice, in *Gardner*, supra, the trial judge did review

confidential portions of the presentence investigation report which was not disclosed to counsel. Not only did the trial judge in *Gardner* consider the information in that report, he used the information as the basis to override the jury's recommendation that Gardner be sentenced to life imprisonment. 430 U.S. at 353.

Implicit in this Court's decision in *Gardner* is that a trial judge may disregard information contained in a presentence investigation report, 430 U.S. at 356 and 358, and Petitioner acknowledges this fact (Pet. at p. 6). Respondent fails to understand how a trial judge may elect to disregard known information to avoid delay, but Judge Mounts could not validly refuse to consider information which he may have had knowledge of because he couldn't release the information to Petitioner.

Petitioner suggests that because Padgett may have told the trial judge that the informant advised him that Petitioner admitted that he committed the crime and that Petitioner committed other crimes, he was not able to dispute the information. What difference does it make *why* a judge disregards information so long as he in fact disregards or does not consider it?

An examination of Judge Mounts' sentence imposed against Petitioner reveals he found Petitioner was never convicted of a felony and that he had no history of criminal activity (Res.App. I). If he had considered the statement made to him by Padgett (assuming they were made) he would not have made the finding that there was no history of criminal activity as a mitigating circumstance. Judge Mounts also found that the circumstantial evidence was such that there was

". . . no question of this defendant's guilt. . ." (Res. App. I). Therefore, the information that Petitioner admitted the killing was of no consequence to Judge Mounts, assuming Padgett advised Judge Mounts of that fact.

This case is not governed by *Gardner v. Florida*, because it is uncontradicted that Judge Mounts did not consider any information which was not disclosed in reaching his determination. This Court did not hold a judge must disclose information he has no intention of considering so a defendant may dispute it thereby allowing him to disregard it! How can anyone intelligently suggest that due process requires a person be given an opportunity dispute information that the court has no intention of considering in the first place. It isn't necessary to accomplish the desired result!

Counsel opines ". . . it is not possible for the trial judge to know what material is in dispute, if defendant has not been given an opportunity to point it out. . ." (Pet. at p. 6). Not true. In this case the trial judge declined to consider *any* information that was not revealed to Petitioner; therefore, there was no need to point out what, if anything, was disputed.

CONCLUSION

The trial judge did not review any material and did not receive a confidential presentence report in this case. In fact, he directed that it not be included in the presentence report. Therefore, *Gardner v. Florida*, supra, is inapplicable. The petition filed herein fails to raise a substantial federal question and this Court

should decline to grant review of the decision rendered by the Florida Supreme Court in this case.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General

RAYMOND L. MARKY
Assistant Attorney General
The Capitol
Tallahassee, FL 32304

COUNSEL FOR RESPONDENT

APPENDIX I

IN THE CIRCUIT COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT, CRIMINAL DIVISION,
IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO. 73-159 CF MOUNTS

STATE OF FLORIDA

vs.

LEARIE LEO ALFORD,

Defendant

FILED
OCT 16 1973
JOHN B. DUNKLE, CLERK
CIRCUIT & COUNTY COURTS
(CRIMINAL D.V.)

FINDINGS OF FACT AND SENTENCE

Pursuant to Florida Statute 775.081, the Defendant, Learie Leo Alford, was charged by indictment with the crimes of Murder in the First Degree and Rape. Trial commenced on April 16, 1973. On April 26th, 1973 a jury of 12 found this defendant guilty of Murder in the First Degree and of Rape as charged. Following a recess to permit counsel to prepare for the separate sentencing proceeding, a majority of the jury recommended to the Court on May 3rd, 1973 that the defendant receive the death penalty.

The sentencing provisions of Florida Statute 921.141 and the recent case of State v. Carl Dixon, et al, Case Number 43,521, (Fla. 1973) require that sentencings in capital felony cases be supported in writing by the trial judge.

Upon my review of both trials, of my trial notes and of the presentence investigation, I find as follows with respect to aggravating circumstances and mitigating circumstances:

- - -AGGRAVATING CIRCUMSTANCES - - -

(a) The defendant in this case was not under sentence of imprisonment for any other crime.

(b) The defendant has never been convicted of another capital felony or of a felony involving the use or threat of violence to another person.

BEST COPY AVAILABLE

(c) The defendant did not knowingly create great risk of death to many persons.

(d) This capital felony of murder in the first degree was committed while this defendant was engaged in the commission of or in flight after committing a life felony which was rape and of which he was also convicted in the same trial.

(e) This capital felony was not committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) This capital felony was not committed for pecuniary gain.

(g) This capital felony was not committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) This capital felony was especially heinous, atrocious and cruel.

- - -MITIGATING CIRCUMSTANCES- - -

(a) This defendant has no significant history of prior criminal activity.

(b) This defendant was not under the influence of extreme mental or emotional disturbance when the capital felony was committed.

(c) The victim of this capital felony was not a participant in the defendant's conduct nor did she consent to his acts.

(d) This defendant was not an accomplice in the capital felony committed; he was the only participant.

(e) This defendant did not act under extreme duress or under the substantial domination of another person in the commission of this capital felony.

(f) The capacity of this defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was not substantially impaired.

(g) The age of this defendant at the time of the commission of the crime is not a factor, he having reached his majority some years prior to the commission of the crime.

I find that aggravating circumstances (d) and (h) are present, that they have been established beyond a reasonable doubt and that mitigating circumstance (a) is present.

With respect to my finding that this capital felony was especially heinous, atrocious or cruel, I observe that I have been engaged in the administration of criminal justice since 1959. During that period of time I have observed a number of brutal and conscienceless crimes. Compared against that experience, the criminal acts of this defendant are particularly shocking heinous, atrocious and cruel. In this respect I cite the scene of the crime, the victim as depicted by photographs introduced into evidence in this case and the testimony of the pathologist describing the wounds, damage and injury occasioned to that pathetic childs body. It is inexpressibly cruel.

Next I note that this case presents a classic example of circumstantial evidence. I find that the circumstantial evidence here was clear and convincing; there is no question of this defendant's guilt, viewed against the process of a trial in which he was ably defended by two competent and thoroughly experienced trial attorneys.

It is ORDERED AND ADJUDGED that you, Learie Lee Alford having been found guilty by a jury of Murder in the First Degree and Rape, I now adjudge you to be guilty and find you to be guilty of Murder in the First Degree and Rape.

I now ask of you if you have any cause or reason as to why the Sentence of the Law and of this Court should not now be imposed?

For the conviction of the crime of Murder in the First Degree, it is the sentence of this Court that you receive the penalty of death.

The Court grants you credit for time served on this sentence from the date of your arrest, January 9, 1973, in the event the death penalty be held unconstitutional by the Supreme Court of the United States.

You are further advised that you have the right to appeal and that your appeal must be undertaken by the filing of a Notice of Appeal within thirty (30) days from today's date.

DONE AND ORDERED at West Palm Beach, Palm Beach County, Florida this 16th day of October, 1973.

MARVIN MOUNTS, JR., Circuit Judge
Criminal Division

APPENDIX II

THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
OF FLORIDA

MARVIN MOUNTS, JR.
JUDGE

COUNTY COURTHOUSE
WEST PALM BEACH, FLORIDA

September 12, 1973

Joel Padgett, Probation Supervisor
Probation and Parole Department
County Courthouse
West Palm Beach, Florida

Re: Learie Leo Alford

Dear Joel:

I know you have expended a great deal of time, effort and conscientious evaluation in the preparation of the pre-sentence report concerning Learie Leo Alford. I recall that you indicated to me that the revelation of the confidential section of this report to the defense would be damaging and compromising to sources who had confided in you. I respect your judgment in this.

I feel, however, in a case in which the jury has recommended the supreme penalty known to our law, that there well may be a constitutional right to disclosure of this confidential section to the defendant. As far as I know, there is not yet a judicial decision on what the meaning of "factual material" in Rule 3.713 (b) may be. I feel that if I cannot release the confidential section to the defendant, I should not review it myself in this particular case. I know that this means that I shall not have the benefit of a major portion of your work in this report because of this view and I regret that this is so.

Accordingly, do not deliver that section of your report to me.

Thank you.

Very truly yours,

Marvin Mounts Jr.

MARVIN MOUNTS, JR.
Circuit Judge

MM/ob
XC: Joel T. Daves, III, Esquire

A P P E N D I X III

IN THE SUPREME COURT OF FLORIDA

LEARIE LEO ALFORD,	*	
APPELLANT,	*	
-VS-	*	CASE NO. 44,647
STATE OF FLORIDA,	*	
APPELLEE.	*	

Docketed
6-16-77
Florida Attorney
General

RESPONSE TO MOTION TO VACATE

Comes now, Appellee, State of Florida, by and through its undersigned attorney pursuant to Rule 3.9(a), Florida Appellate Rules, and files this its Reply to the Motion to Vacate heretofore filed and says as follows:

I

The confidential evaluation dated September 17, 1973, does not contradict the written response filed by the Honorable Marvin U. Mounts, Jr. on May 10, 1977, as is evident by the letter of September 12, 1973, from Judge Mounts to Joel C. Padgett, the officer who prepared the report for the Florida Parole and Probation Commission.

II

Even assuming the trial judge was ". . . made aware of *certain facts* during his discussion with the Parole and Probation Officer. . ." that doesn't mean he *"considered"* those facts in imposing the sentence. There is a decided difference between being "aware" of certain facts and "considering" them. Indeed, in *Gardner* itself the United States

Supreme Court recognized this for it said ". . .[i]n those cases in which the accuracy of a report is contested, the trial judge can avoid delay by disregarding the disputed material. . . ." Opinion at p. 10.

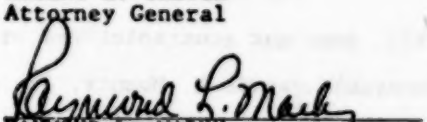
III

It is obvious from the record now before this Court that the trial judge did not impose the death sentence on the basis of information which was contained in the confidential portion of the presentence report and therefore *Gardner v. Florida*, 45 U.S.L.W. 4275 is inapplicable to the instant case. The sentence was based upon the evidence alluded to and for the reasons stated in the written finding of fact quoted by this Court in the opinion filed on January 29, 1975.

Appellee respectfully moves that the Motion to Vacate be denied.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General



RAYMOND L. MARKY
Assistant Attorney General
The Capitol
Tallahassee, FL 32304

COUNSEL FOR APPELLEE

CERTIFICATE OF SERIVCE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Motion to Vacate has been forwarded to Mr. David Roth, Attorney at Law, Post Office Box 3466, West Palm Beach, FL 33402, via U. S. Mail, this 16th day of June, 1977.



Raymond L. Marky
Assistant Attorney General